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JOHN F. DAVIS,

IN THE

Supreme Court of the United States

October Term, 1965
No. 584

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

ROY ALLEN STEWART,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

PETITIONER'S REPLY BRIEF ON THE MERITS.

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PETITIONER'S REPLY BRIEF ON THE MERITS.

Introduction.

In our opening brief, we argued that the facts of this case differ from those of *Escobedo* in every significant respect, including the one fact crucial to the *Escobedo* reversal: that in *Escobedo* the state laid its heavy hand between a suspect and his attorney, but did not do so here. We argued also that the exclusionary rule adopted in *Dorado* and applied in this case is an unnecessary and undesirable extension of Escobedo, an extension made in the face of the explicit and limited holding of the *Escobedo* decision.

We had hoped that in joining issue with us Stewart would have met us on our own ground. To the contrary, he has attributed to us imaginary positions and concessions, dismissed with fleeting mention the serious question of policy which we raised, and advanced as an alternative ground for affirming the judgment a constitutional theory which he never urged upon the California Court, a theory based upon a misconstruction of the applicable California statute and fortified by the failure to consult a calendar.

We note as well, and with some surprise, that at this late stage of the litigation there is no agreement as to what act or acts Stewart admitted committing. For notwithstanding the testimony of the investigating officers, notwithstanding his own testimony, notwithstanding the argument of his own counsel to the jury, and notwithstanding the text and context of the confession itself, Stewart suggests in his brief that he did not admit having committed the murder for which he was convicted at his trial. (Resp. Br. pp. 26-28, and fn. 19.) Before proceeding any further, his suggestion should be put to rest.

It is undisputed that Miss Mitchell was kicked to death. On her right ear and on the left temporal area of her head were crescent-shaped lacerations made by a hard object with a curved-contact surface which could have been a shoe. [Rep. Tr. pp. 649-651, 656-657.] The officers did not conceal from Stewart the fact that she had died. Indeed, a photograph of her

head was shown to him during the tape-recorded conversation and Officer Logue described one of her injuries to him as "the one that caused her death . . ." [Rep. Tr. p. 738.]

On direct examination, Logue testified that prior to the tape-recorded conversation Stewart said that "he had caused the death of Mrs. Mitchell, that was the sustance of the conversation." [Rep. Tr. p. 733.] According to Officer Mangiameli, Stewart made a statement to the "effect" that he snatched her purse, took her watch and kicked her. [Rep. Tr. p. 963.] In closing argument, Stewart's attorney said that his client had admitted "to the investigating police officers that he had committed at least, not at least, at most the one offense, Count No. 7" (the murder count). [Rep. Tr. p. 1202.] During the tape-recorded conversation, Stewart repeatedly said that he "may have" or "could have" kicked Miss Mitchell. [Rep. Tr. pp. 736, 738, 745.] He testified that he told the officers that he had kicked her. [Rep. Tr. pp. 844-845, 874.] At the inception of the tape-recording, Logue told Stewart: "Now you said you did it, *you're sorry,* and that is just exactly what the word is going to be as far as we are concerned." [Rep. Tr. p. 734.] All the foregoing lends weight to the testimony of Logue on redirect that when he first entered the room he said: "Roy, you killed that old woman over on Cimarron Street and you are not even sorry," and that when Logue repeated the statement Stewart said: "Yes, I'm sorry. I'm sorry I killed her. I didn't mean to kill her." [Rep. Tr. p. 789.]

We have gone into this subject at length because of Stewart's further suggestion that "after five days of secret interrogation on a string of crimes, including robbery, rape and murder," he "decided to end the seemingly interminable jailhouse proceedings by confessing simply that he took one woman's purse. In short, he may have thought he could 'plea bargain' for himself, thereby avoiding the risk of a more serious conviction, whether guilty or innocent." (Resp. Br. p. 26.) This, we might add, is not only inconsistent with his own testimony at the trial, but it fails to explain why, instead of confessing to some other offense, he would have chosen to admit having robbed the one woman who died as a result of the robbery.

ARGUMENT.

I.

In Reply to Stewart's Escobedo Claims.

As we understand Stewart's argument, it proceeds as follows: 1. Where the right to counsel exists, the right does not depend upon a request for counsel. 2. Prior to the filing of formal charges, the right to counsel matures when the "accusatory stage" comes into being, to wit, when a person is in police custody, is the "focus" of police suspicion, and has been subjected to a "process of interrogations" likely to "elicit incriminating statements." 3. Once the "accusatory stage" has arisen, the denial of a request for counsel is relevant only in deciding whether there has been a waiver of counsel. For the first and third propositions, Stewart cites *Carnley v. Cochran,* 369 U.S. 506. For the second, he cites *Escobedo.*

The argument is based, we submit, upon the mistaken assumption that the right to counsel during police interrogation is the same as the right to counsel at trial. If it is not, then *Carnley* is inapposite, for *Carnley* was concerned with the right to counsel during formal judicial proceedings.

The right to counsel at trial is of course absolute. If the defendant cannot afford an attorney the state must get him one. (*Gideon v. Wainwright,* 372 U.S. 335.) But we do not think that *Escobedo* articulated an absolute right to counsel during police interrogation, a right in which all suspects have a contingent executory interest vesting when the police begin to ask them questions. To argue otherwise is to divorce the case from its facts, from its holding, and from its careful use of

words of limitation: "under the circumstances," "in the context of this case," "where, as here," "under the circumstances here." (*Escobedo v. Illinois,* 378 U.S. 478 at 479, 485, 490, 492.) Furthermore, as we have repeatedly emphasized, the Chicago police took affirmative steps to keep Escobedo and his lawyer apart. We find it difficult to believe that this fact was not one of the totality of circumstances which led this Court to the conclusion that Escobedo had been denied counsel.

Turning from the text of *Escobedo,* we wish to amplify two of the arguments contained in our opening brief.

1. We said that in our view the effects of the "Dorado rule" will be "grave, grave enough to give pause." (Pet. Br. p. 46.) Stewart of course disagrees. (Resp. Br. pp. 40-42.) Others have assumed an attitude of studied neutrality, suggesting that because of the conflict in viewpoints the problem may be set to one side. (Pet. Br. in *Miranda v. Arizona,* No. 759, October Term, 1965, p. 45.) But this is Russian roulette with a vengeance. For if the "Dorado rule" is adopted by this Court, its consequences will be widespread beyond all imagination. Looking to the country at large, there were during the year 1963 a total of 4,437,786 arrests. Looking to California alone, there were in that year 98,535 adult felony arrests, 595,992 adult misdemeanor arrests and 244,312 arrests of juveniles. Looking, alone, to the city where this brief is being written, the Los Angeles police conducted 183,299 criminal investigations during 1963, they made 171,252 adult arrests and 24,633 juvenile arrests and they answered 2,425,205 calls for police service. (Barrett, "Criminal Justice: The Problem of Mass Production," in

Jones, ed., The Courts, The Public and the Law Explosion, at p. 95.) It is, therefore, a bit premature for Stewart to assert that all society will face is the "occasional release of the guilty." (Resp. Br. p. 45.)

2. We challenged also the assumptions of the California Supreme Court that the "Dorado rule" was necessary to prevent coercion and to insure the equal treatment of suspects in police custody. (Pet. Br. pp. 38-40.) As to the first point we have nothing further to add, but as to the second point we wish to call this Court's attention to the recent Bazelon-Katzenbach correspondence and to quote briefly from the deliberately measured words of the Attorney General of the United States:

> "Your suggestion that police questioning will primarily affect the poor and, in particular, the poor Negro, strikes me as particularly irrelevant. The simple fact is that poverty is often a breeding ground for criminal conduct and that inevitably any code of procedure is likely to affect more poor people than rich people. For reasons beyond their control, in Washington many poor people are Negroes; in Texas, Mexicans; in New York City, Puerto Ricans. A system designed to subject criminal offenders to sanctions is not aimed against Negroes, Mexicans or Puerto Ricans in those jurisdictions simply because it may affect them more than other members of the community.
>
> "There are, of course, inequities in our society resulting from differences in wealth, education, and background, and these inequities are some-

times reflected in the outcome of the criminal process. Poverty, ignorance and instability produced by wretched living conditions may make an individual's criminal acts more susceptible to discovery and proof. But I am sure you will agree these same conditions are major causes of crime. So long as they exist and lead an individual to victimize his fellow citizens, government cannot and should not ignore their effects during a criminal investigation. Otherwise, so many persons guilty of crime would be insulated from conviction that our system of prevention and deterrence would be crippled. . . .

". . . And to a man convicted because he was careless in leaving a fingerprint, or too poor to change his tell-tale clothes after a crime, there is no more galling governmental act than the release of one who betrayed himself in answering a question. Furthermore, in the elimination of questioning a high price would be paid by the innocent who are exculpated early in the criminal process by police questioning, and by those who appear at first to deserve a more serious charge than is eventually filed after questioning. The introduction of counsel at this early stage would not, as you suggest, promote this screening, for there must be the possibility of an incriminating as well as an exculpatory outcome if there is to be imaginative and energetic investigatory questioning." (Equal Treatment in the Enforcement of the Criminal Law: The Bazelon-Katzenbach Letters, 56 J. Crim. L. C. & P. S. 498 at 501-02.)

II.

In Reply to Stewart's Wong Sun Claims.

Stewart made his confession on February 5, 1963, after less than three hours of questioning by Officers Logue and Mangiameli. As an alternative ground for affirming the judgment, he contends that the confession was obtained during a period of illegal detention in "brazen violation of the California statutes limiting police authority to detain arrested persons." (Resp. Br. p. 46.) And he urges that it was therefore inadmissible under *Wong Sun v. United States,* 371 U.S. 471.

The arrest took place at 7:15 p.m. on January 31, 1963 and Stewart was taken before a magistrate on February 5th, after he had confessed. [Rep. Tr. p. 698; Resp. Br. p. 3 and fn. 1.] January 31st was a Thursday and February 5th was a Tuesday.

The governing statute is Cal. Penal Code, Section 825. (Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Cal. L. Rev. 11 at 30, fn. 79, and cases cited.) At the time of Stewart's arrest, the relevant paragraph of the statute read as it reads now:

> "The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; provided, however, that when the two days prescribed herein expire at a time when the court in which the magistrate is sitting is not in session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following."

Stewart has explicitly conceded the constitutionality of Section 825. (Resp. Br. p. 46.) Under the statute, Sundays and holidays are specifically excluded from the 48-hour period of detention. The term "holidays" includes Saturdays, for Saturday is a holiday in the Municipal Court. (Cal. Government Code, Sec. 72305; *People v. Mitchell,* 209 Cal. App. 2d 312 at 320, 26 Cal. Rptr. 89 at 93.) Excluding Saturday, February 2nd, and Sunday, February 3rd, the 48 hours expired at 7:15 p.m. on Monday, February 4th. (*People v. Ross,* 236 A.C.A. 387 at 391, 46 Cal. Rptr. 41 at 43.) At that time "the court in which the magistrate is sitting" was "not in session," and by virtue of the statutory proviso, added in 1961, the detention period was "extended to include the duration of the next regular court session on the judicial day immediately following," that is, until the close of court on Tuesday, February 5th.[1]

The foregoing, we submit, is sufficient to dispose of Stewart's claim that his confession was obtained during a period of unlawful detention. Assuming, however, for the sake of argument, and solely for the sake of argument, that there was an unlawful detention, we would commend to this Court the reasoning of Justice Traynor in *Rogers v. Superior Court,* 46 Cal. 2d 3 at 10-11, 291 P. 2d 929 at 933-34:

> "There is a basic distinction between evidence seized in violation of the search and seizure provisions of the Constitution of the United States and

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[1]Reproduced as Appendix A to this brief is Section 775.15 of the Los Angeles Police Department Manual. Reproduced as Appendix B is an informal guide to investigators on felony release time limitations. The guide is a "rule of thumb" in general use but has no official status.

the Constitution of California and the laws enacted thereunder, and voluntary statements made during a period of illegal detention. It may be true, as petitioner contends, that had he been arraigned within 48 hours and advised of his rights, he would not have volunteered to say anything. (*Cf. People v. Stroble,* 36 Cal. 2d 615, 626, 627 [226 P.2d 330]; and see *People v. Zammora,* 66 Cal. App. 2d 166, 220 [152 P.2d 180].) Nevertheless, there is lacking the essential connection between the illegal detention and the voluntary statements made during that detention that there is between the illegal search and the evidence obtained thereby, or between the coercion and the confession induced thereby. The voluntary admission is not a necessary product of the illegal detention; the evidence obtained by an illegal search or by a coerced confession is the necessary product of the search or of the coercion. When questioned by arresting officers a suspect may remain silent or make only such statements as serve his interest; the victim of an illegal search, however, has no opportunity to select the items to be taken by the rummaging officer (*State v. Sanford, State v. Ellis,* 354 Mo. 998, 1012 [193 S.W.2d 37, 38] concurring opinion of Hyde, J.; *State v. Guastamachio,* 137 Conn. 179 [75 A.2d 429, 431]; *cf., Milbourn v. State,* 212 Ind. 161 [8 N.E.2d 985, 986]; *Quan v. State,* 185 Miss. 513 [188 So. 568, 569]; 14 So.Cal.L. Rev. 477), and the victim of a coerced confession has been deprived of any choice. . . ."

Conclusion.

We accordingly renew our request that the judgment of the Supreme Court of California be reversed.

Respectfully submitted,

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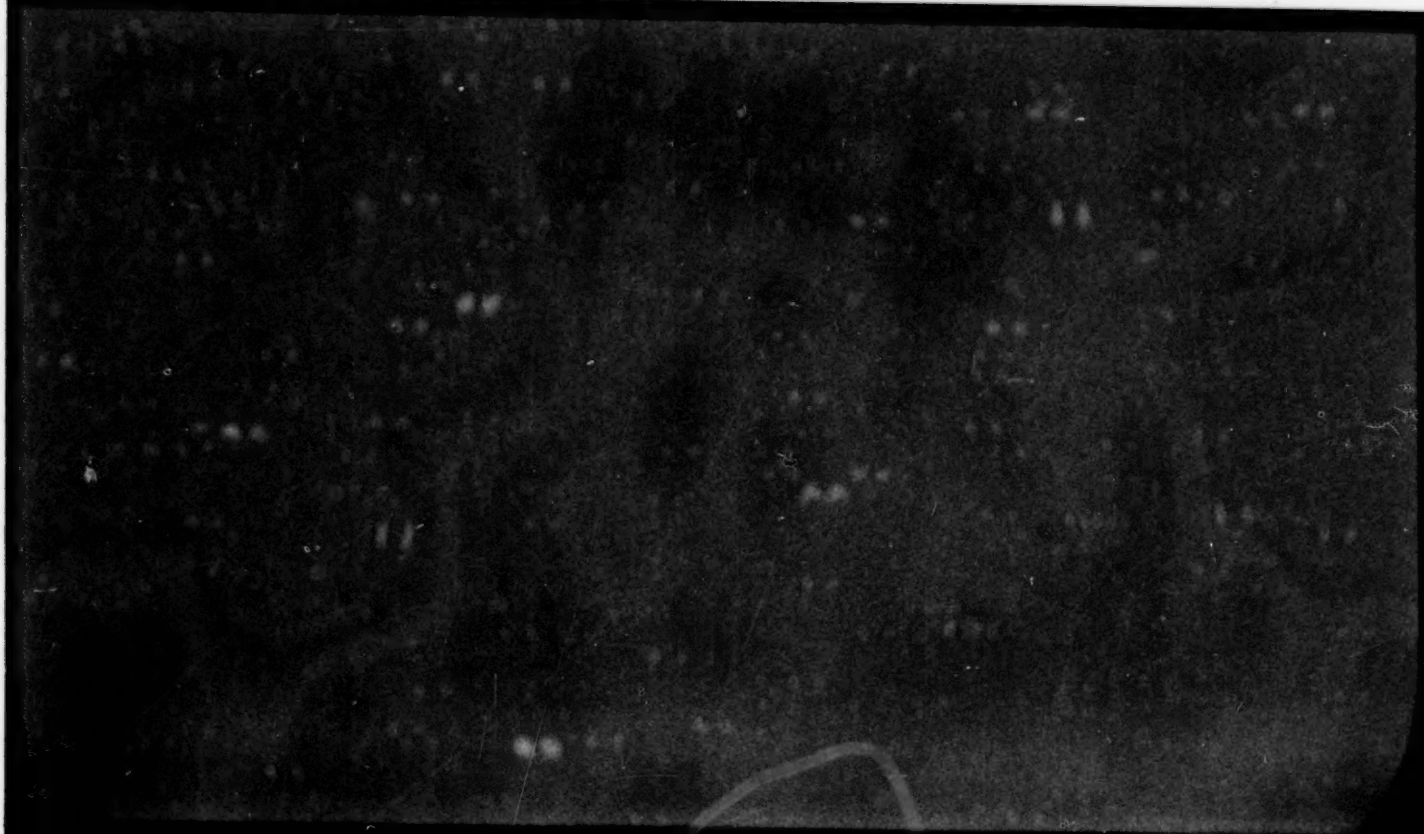

APPENDIX A.

775.15 ARRAIGNMENT OR RELEASE OF PRISONERS WITHIN FORTY-EIGHT HOURS. The assigned investigating officer shall be responsible to cause the arraignment or release of a prisoner without unnecessary delay, and, in any event, within forty-eight hours from the time of arrest excluding Saturdays, Sundays and holidays. If the investigating officer is not available at the time a prisoner is due to be arraigned or released, the watch commander of the investigating division shall be responsible to effect the arraignment or release.

Exception: When the forty-eight hours expire at a time when the court is not in session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following.

APPENDIX B.

The following guide is offered to aid investigators on felony release time limitations.

ARREST TIME	RELEASE TIME
Mon 9am to 4pm	Wed 9am to 4pm
Mon 4pm to Tues 9am	Thurs 4pm
Tues 9am to 4pm	Thurs 9am to 4pm
Tues 4pm to Wed 9am	Fri 4pm
Wed 9am to 4pm	Fri 9am to 4pm
Wed 4pm to Thurs 9am	Mon 4pm
Thurs 9am to 4pm	Mon 9am to 4pm
Thurs 4pm to Fri 9am	Tues 4pm
Fri 9am to 4pm	Tues 9am to 4pm
Fri 4pm to Mon 9am	Wed 4pm

EXCLUDING COURT HOLIDAYS